No. 96-1581

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, FLORIDA, IDAHO, MISSOURI AND UTAH

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BRIEF OF AMICI CURIAE

The States of California, Alabama, Alaska, Florida, Idaho, Missouri and Utah through their respective Attorneys General respectfully submit a brief amicus curiae in support of Petitioner pursuant to S.Ct.R. 37.

INTEREST OF AMICI STATES

The United States has created reservations through treaty, statute, or executive order within each of the amici States.[1] By virtue of those reservations, amici states have two interrelated interests. First, they have a compelling need to shield their citizens and their own governments from the uncertainty fostered by conflicting decisions of state and federal courts regarding reservation status. For example, persons living and doing business on the non-tribal land within the boundaries of the original 1858 Yankton Sioux Reservation have no definitive answer to the basic questions of whether state or tribal law applies to garden-variety commercial transactions and torts, and property transactions when tribal members and nonmembers are involved. South Dakota's sovereign powers are placed no less in doubt – as reflected in the need to conduct a five-day trial in federal district court over its and Yankton Sioux Tribe's power to regulate a proposed solid waste facility – a permitting process that under

[1] Some of amici, such as the State of Missouri, may have reservations established in the future, and have questions arising from reservations bordering the State's boundaries.

ordinary circumstances would have been handled administratively with little cost and no litigation. Moreover, South Dakota's historic authority to enforce criminal laws in a uniform fashion against all offenders has been turned upside down by the court of appeals' decision. This kind of judge-made jurisdictional uncertainty serves generally only to engender public cynicism over the efficacy of government.

Second, the profound jurisdictional consequences of reservation boundaries mean that the amici States have a strong interest in ensuring that this Court's efforts to create a reasonably clear body of analytical standards for purposes of determining disestablishment or diminishment questions are honored rigorously by lower courts. Such a situation exists here. In *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), this Court articulated a bright-line rule that the inclusion of "cession and sum certain" language in a surplus land act creates an "almost insurmountable presumption" of disestablishment. Such "cession and sum certain" language was employed in Articles I and II of the Yankton Agreement with the United States. App. 112-13. The majority of the Eighth Circuit panel below, however, apparently found that the presumption was inapplicable or that it was rebutted by a savings provision whose substantive reach is, at best, ambiguous. This case presents an opportunity to clarify the strength of the presumption identified in *Solem*.

SUMMARY OF ARGUMENT

Supreme Court Rule 10(a) provides that a primary reason for the exercise of this Court's certiorari jurisdiction is to resolve conflicts between a federal court of appeals and a state court of last resort. The conflict between the state and federal courts here raises the question of whether the Yankton Sioux Reservation has been disestablished. This type of conflict regularly has led to the grant of certiorari because it calls into question the validity of virtually all forms of civil and criminal regulation. Certiorari is also appropriate in this case to vindicate a comparatively rare "bright-line rule" distilled by this Court from its Indian law precedents. The Court has found that when a surplus land act utilizes "cession and sum certain" language, an "almost insurmountable presumption" is raised that the reservation has been disestablished. In this and other areas of Indian law that bear a close relationship to the authority of States and tribes to exercise governmental powers, reasonably concrete and settled standards are critical and the scrupulous adherence to them by lower courts should be monitored closely by this Court. The application of the "cession and sum certain" presumption by the divided panel below raises a substantial question over the panel's fidelity to this Court's prior disestablishment and diminishment decisions.

ARGUMENT

I

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SOUTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT AS TO THE DISESTABLISHMENT OF THE YANKTON SIOUX RESERVATION.

State and federal courts have equal authority under the Constitution to resolve questions of federal law unless Congress has otherwise directed. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Grubb v. Public Utilities Commission*, 281 U.S. 470, 476 (1930); *see also Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, ___ n.11. Pursuant to that authority and prior to the Eighth Circuit's decision, the South Dakota Supreme Court on four occasions found that the Yankton Sioux Reservation had been disestablished. *State v. Thompson*, 355 N.W.2d 329, 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964). Despite these decisions, the district court concluded that the Reservation had not been diminished, App. 66, and a divided panel of the Court of Appeals for the Eighth Circuit affirmed. App. 1. Moreover, shortly after the decision below the South Dakota Supreme Court again determined that the Yankton Sioux Reservation had been diminished. *State v. Greger*, 559 N.W.2d 854 (S.D. 1997); App. 125.

Supreme Court Rule 10(a) provides that conflicts between a court of appeals and a state court of last resort are of the "character" which counsel exercise of this Court's certiorari jurisdiction. As demonstrated by the

Court's action in several recent cases, situations where state and federal courts disagree as to the disestablishment of a reservation present especially compelling arguments for the grant of certiorari. *See, e.g., Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 430-31 (1975). As a doctrinal and practical matter, the grant of certiorari to resolve a state-federal conflict simply reasserts this Court's position as the ultimate arbiter of federal law. *See* U.S. Const. art. III. The present case constitutes a paradigm of when this Court's intervention is essential, since the Eighth Circuit and South Dakota Supreme Court decisions over the existence of the Reservation have created a controversy resolvable *only* by this Court.

The present controversy, however, is not merely academic. It has an immediate and pernicious impact on governance within the affected geographical area.

Commercial Transactions. The state-federal conflict at issue here undermines the ability of members and nonmembers alike to engage in commercial transactions, at least on the 91 percent nontribal land within the Reservation's 1858 boundaries, by disrupting established commercial practices and understandings. Prior to the federal decisions below, it was clear that a commercial transaction on nontribal land would be governed by state law and that any attendant disputes would be heard in state court absent federal jurisdiction. In view of the court of appeals' decision, a tribal member defendant almost certainly will argue that the proper venue for disputes regarding such a transaction is in tribal court and that tribal law provides the rule of decision. *See, e.g., Williams*

v. Lee, 358 U.S. 217 (1959). Well-established commercial practices and understandings thus are disrupted by the conflict.

Tort Claims. The conflict raises potentially daunting problems with respect to the resolution of tort claims. Prior to the decision below, it was clear that a tort claim arising on nontribal lands within the 1858 boundaries would be heard in state court under state law. Now, however, a tribal member may well bring a tort action in tribal court or, should he be joined as a state court defendant, deny the jurisdiction of the state court. *See, e.g., Strate v. A-1 Contractors*, No. 96-1872, 1997 WL 202022 (U.S. Apr. 28, 1997); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

Civil Regulatory Matters. Prior to the decisions of the federal courts, it was undisputed that South Dakota exercised general civil regulatory jurisdiction over all persons with respect to activities on the nontribal lands. The conflict between the state and federal courts puts such jurisdiction into dispute. It is, therefore, unknown whether the State can continue to exercise its jurisdiction over tribal members on nontribal lands for hunting and fishing, taxation, zoning and environmental purposes. Likewise, the extent of potential tribal claims of tribal jurisdiction over nonmembers with regard to these areas is unknown. Even if this Court affirms the decisions of the federal courts that the reservation has not been disestablished, the residents of the area can expect constant unsettling litigation over whether the tribe can exercise jurisdiction over nonmember in nontribal areas. *See, e.g., Strate*, supra (adjudicatory jurisdiction over motor vehicle accident); *South Dakota v. Bourland*, 508 U.S. 679 (1993)

(hunting and fishing); *Brendale Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning); *Montana v. United States*, 450 U.S. 544 (1981) (hunting and fishing).

Alcohol Regulation. Prior to the decisions of the federal courts, South Dakota exercised unrestricted jurisdiction over alcohol within the non-tribal lands of the now-recognized boundaries. Under *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), this decision raises the possibility that the tribe will attempt to exercise jurisdiction over non-Indians selling liquors on non-Indian lands within the 1858 boundaries. Regardless of tribal jurisdiction, moreover, the United States may seek to enforce tribal law through prosecutions under 18 U.S.C. § 1161. *United States v. Mazurie*, 419 U.S. 544 (1975).

Criminal Matters. Prior to the decision of the federal courts, the state courts exercised general criminal jurisdiction over Indians and non-Indians alike with respect to conduct on nontribal lands. *See, e.g.*, Tr. 315-319, 330-31, 646-47, 727-28. The conflict between the state and federal courts leaves the proper jurisdiction of any criminal case involving an Indian as an unknown; likewise, the question of the appropriate criminal jurisdiction of a non-Indian committing a crime against a tribal member is an unknown.

Amici understand that habeas corpus proceedings are now proceeding through the court systems with regard to Indians who have been convicted in state court; others are expected. Without a decision from this Court, however, the appropriate answer to the criminal jurisdictional questions is simply unknown.

The conflict between the state and federal courts with regard to the diminishment of the Yankton Sioux Reservation produces legal questions that permeate the daily lives of each of the residents of the purported reservation area. Only the grant of certiorari by this Court and disposal of the matter on the merits can resolve these questions.

II

THE FAILURE OF THE COURT BELOW TO APPLY THIS COURT'S BRIGHT-LINE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT MERITS REVIEW.

A 1982 treatise observes that Indian law is woven from a

> fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporations, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation that could not have been predicted by analysis of the applicable law from these other fields.

Felix S. Cohen's Handbook of Federal Indian Law 1 (Rennard Strickland et al. eds., 1982); *see also American Indian Law Deskbook* xii (Nicholas J. Spaeth et al. eds., 1993) ("shifts in U.S. Indian policy have created a complicated legal structure"). The complexity of legal analysis regarding Indian law questions raises difficult challenges for federal, state, and tribal governments and for Indians and

non-Indians alike. Therefore, when this Court derives a clear rule of law to be applied to a particular issue in the Indian law field, it would be thought that the lower courts would readily and dutifully adopt that rule. A divided panel of the Court of Appeals in the Eighth Circuit failed to do so in this case, giving rise to the present controversy.

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court distilled much of its disestablishment jurisprudence into a single illuminating paragraph. That paragraph recognized an "almost insurmountable presumption of disestablishment when "cession" language is accompanied in a surplus land act by an unconditional commitment of Congress to pay for the opened lands. The critical paragraph read:

> Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found. . . . The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. . . . *When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant the tribe's reservation to be diminished.*

Solem, 465 U.S. at 470-71 (citations omitted; emphasis added). Ten years later, in *Hagen v. Utah*, 510 U.S. 399 (1994), this Court reiterated the presumption finding that the "statutory expression of congressional intent to diminish, coupled with a provision of sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished." *Id.* at 411.

In the case now before this Court, the "almost insurmountable presumption" of disestablishment was created by the "cession and sum certain" language of Articles I and II of the Agreement of the Yankton Sioux Tribe with the United States. App. 112-13. Nonetheless, the divided panel below essentially ignored the presumption. The majority did acknowledge that the state had *made the argument* that the "cession and sum certain" language of the 1894 Yankton Act gave rise to the presumption, App. 14, but it gave little or no weight to the presumption, relying instead largely on a savings provision in Article XVIII of the 1892 agreement to conclude that diminishment had not taken place. As Judge Magill commented in his lengthy dissent: "[T]he majority never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted." App. 47-48 (footnote omitted). In the accompanying footnote, he remarked further that

> [w]hile the majority makes two passing references to this critical presumption, it couches each reference as a mere restatement of the appellant's argument. . . . Nowhere in its opinion does the majority acknowledge that the appellant is correct that this almost insurmountable presumption of diminishment was created by Articles I and II.

App. 47.

This case, in short, turns on the strength of the presumption identified in *Solem*. The court of appeals, however, did not directly apply the presumption, and can only be implied to have determined that the presumption was, for some reason, inapplicable, or that it had been overcome on the basis of the savings provision. Although amici harbor significant doubts over either approach, at the least the decision raises substantial questions over the applicability of the "almost insurmountable" presumption created by cession and sum certain language and the weight to be assigned to such a presumption in a surplus land act. These are questions this Court should resolve now not only to give guidance to lower courts in future cases but also to put an end to the jurisdictional nightmare resulting from the inconsistent resolution of the diminishment issue by the court of appeals and the South Dakota Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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